

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 2, 2007

DENISE ELIZABETH BAILEY PRICE v. GREGORY ROSS PRICE

Appeal from the Circuit Court for Sumner County
No. 26502-C C.L. Rogers, Judge

No. M2005-02704-COA-R3-CV¹ - Filed on May 29, 2007

Denise Elizabeth Bailey Price (“Wife”) filed an amended complaint seeking a legal separation from Gregory Ross Price (“Husband”). Husband responded with a counterclaim requesting an absolute divorce. Following a bench trial, the court declared the parties divorced and awarded Wife “transitional” alimony in a gross amount of \$1,821 per month for 36 months. The trial court also decreed that each party would be responsible for the party’s own attorney’s fees. Wife appeals, challenging the trial court’s failure to grant her a legal separation. Wife also raises an issue with respect to the type and amount of alimony awarded by the trial court. She also challenges the trial court’s refusal to award her any portion of the fees of her counsel. We modify the trial court’s alimony award to make it an award of alimony in futuro to terminate upon the death or remarriage of Wife. The judgment of the trial court, as modified, is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Grayson Smith Cannon, Goodlettsville, Tennessee, for the appellant, Denise Elizabeth Bailey Price.

John R. Phillips, Jr., Gallatin, Tennessee, for the appellee, Gregory Ross Price.

OPINION

¹This Middle Section case was assigned to this Eastern Section panel of judges on April 2, 2007.

I.

Husband and Wife were married on July 19, 1995. Their marriage was Wife's second and Husband's fourth. No children were born to their union. They separated in October 2003. At the time of trial in September 2005, Wife was 44 and Husband was 46.

Wife filed her original complaint in January 2005. She initially sought a divorce, alleging that Husband was guilty of inappropriate marital conduct. She also charged that irreconcilable differences had developed between the parties. Wife sought an equitable division of the marital property, alimony pendente lite, alimony in futuro, and an award of attorney's fees.

In March 2005, the trial court entered an agreed order. The order directs Husband to make monthly payments for specified bills of Wife totaling \$681. Wife also was awarded temporary possession and exclusive use of the parties' Ford Explorer. The agreed order was to stay in effect until the trial court directed otherwise.

In May 2005, Wife filed a motion. She sought to amend her complaint so as to seek a legal separation instead of an absolute divorce. An agreed order was entered granting Wife's motion and changing all references in the original complaint to conform to the amendment.

Husband filed a response to the amended complaint generally denying the pertinent allegations contained in that pleading. Along with his response, Husband filed a counterclaim seeking an absolute divorce based upon the ground of inappropriate marital conduct. In the alternative, Husband alleged that irreconcilable differences had arisen between the parties. Husband sought an equitable division of the marital property and an order directing that each party be responsible for the party's own attorney's fees.

A plenary trial was held in September 2005. There were three primary issues before the court. The first issue was whether the trial court should grant an absolute divorce or legal separation. In this connection, the parties stipulated that each party had grounds that would entitle each to a divorce or legal separation.² The second issue was whether Husband was entitled to be compensated for the fact that Wife had retained most of the net proceeds from the sale of the parties' marital residence. All other issues pertaining to the division of marital property and marital debt had been resolved by the parties prior to trial. The final issue at trial pertained to the subject of alimony. Specifically, whether Wife was entitled to alimony and, if so, what type of alimony as well as the amount. The issue of attorney's fees was also "in play."

The parties' briefs on appeal contain virtually identical sections entitled "Statement of the Facts." Since the parties agree on the majority of the pertinent facts, we will quote the common facts

² T.C.A. § 36-4-129(a) (2005) provides that "[i]n all actions for divorce from the bonds of matrimony or legal separation the parties may stipulate as to grounds and/or defenses."

from their briefs. The few differences between the parties' recitation of the facts will be addressed in footnotes. The facts are as follows:

The parties were married on July 19, 1995. They had been married ten years at the time of the final hearing. There were no children of the marriage. The Wife had two children from a previous marriage: a 17 year-old daughter who lived with her, and a son who visited.

The Wife testified that she had not worked during the parties' marriage nor during her eleven year marriage previous to the marriage to Husband. At the time of the marriage, Wife was in school, attempting to finish a teaching degree. However, she had been unable to finish school as she was diagnosed with brain cancer after the parties had been married less than three years.

Husband testified he [has] been employed by the United States Postal Service as a letter carrier since 1997. He also received income from a military retirement from the Marine Corps.

The Wife testified that her prognosis from the cancer was "five to ten years," but that she was hoping for ten. At the time of trial, it had been seven years since her diagnosis. The Wife described her treatment and resulting deficits in memory, spatial disorientation, and fatigue in detail. She testified that after the Husband left, she had applied for and received Supplemental Security Income (SSI) disability benefits, and was receiving them at the time of trial.

Wife testified that she was very concerned about health care coverage; she had continued to use Husband's health insurance and wanted to be able to continue the coverage without having to be limited by the thirty-six (36) month limitation of COBRA continuation coverage, because she anticipated her illness would be worsening at the same time COBRA would end [- presumably in approximately October 2008.]³

There was extensive testimony by the Wife about some of the activities she had tried to continue doing because they gave her hope and a sense of being able to continue to contribute to the community. She described how she participated in a few community theater plays with the assistance of her teenage daughter and the other players, and some efforts to do volunteer work. She also explained that traveling

³ The bracketed material in contained only in Husband's brief.

was very important to her and that it was in fact, part of a pattern of going on trips that had been established early in the marriage when she was first diagnosed. She explained that she had continued to travel after the parties' separation.

The Wife testified that at the time the parties married, she owned a home described as the Cherry Hill house, but when she was diagnosed and they realized she would not be able to work or finish school, they determined to refinance the house to pay off her credit cards, thus jointly titling this property to both of the parties. The Wife testified that after the parties separated, they decided to sell the Cherry Hill house so that she could move to Gallatin to be near friends. At the time, the parties had planned to remain married. They made an agreement regarding disposition of the closing proceeds on Cherry Hill and Wife proceeded, in reliance upon this, to pay off certain debts and move to the new residence.

The Wife explained that she did not have the financial means to purchase the new house in her own name. She testified that she and Husband had initially planned to purchase the new home together, but that at the last minute, Husband backed out after the buyers of Cherry Hill were already in the process of moving in. She had no alternative living arrangements, so the Wife entered into an agreement with a family trust to purchase the house she had already selected, which agreement allowed her to rent the home from the trust. Although the Wife had contributed part of the proceeds she received from the sale of Cherry Hill to the trust, she testified she did not have the right to withdraw these funds. The money in the trust was used to defray the difference in the amount Wife was able to pay for rent, and the amount required by the lease. Since the sale of the Cherry Hill home, Husband had moved first to an apartment, and then had purchased a home for himself in Hendersonville that Wife agreed not to claim an interest in.

The Wife testified that the parties did not have joint debts; she had debts to a Provident credit card and to Vanderbilt Hospital. She testified that during the pendency of the case, she had struggled financially while receiving only her child support, SSI benefits and the debt payments made by the Husband under the Court's temporary order.

The Wife testified under cross-examination that she had been unable to obtain subsidized housing due to a lengthy waiting list. She was

unable to live with her parents due to her father having lost his job and the parents' move to a smaller place.

Husband testified that he did not believe Wife should need to stay on his health insurance because she could get SSI and Medicaid, so she did not need his insurance any longer. Husband testified that he thought he should have gotten more of the proceeds of the Cherry Hill house, despite his agreement with Wife to take only \$2,100 at the time of sale. He alleged that he had taken out a second mortgage on the residence in Hendersonville he purchased after the separation, in order to pay the credit card debt that had been incurred during the marriage.

Husband did not deny Wife's diagnosis of cancer, nor her prognosis [from 1998].⁴ However, he claimed that despite her memory loss, she was "exaggerating her disability." He admitted that he had observed she was tired on the many trips they began taking after her diagnosis, trips which he had voluntarily taken a second job to pay for, but claimed that this was "normal." He testified that "[s]he would occasionally get lost, but she would get to where she was going." Husband complained at length of Wife's spending habits and what he contended were unwise choices Wife had made regarding her housing. He noted that she had failed to request subsidized housing when the parties first separated. If she had done so she might have been already in an income-based apartment at the time of trial.⁵

Husband testified that he received \$1,595.00 per month in military retirement, of which he had an allotment made to his mother as a way of "helping take care of" her. He was paid approximately \$21.00 per hour at his post office job. His net average take home pay from the post office was \$3,441.59 per month [including substantial overtime].⁶

Husband admitted that his income and expense statement showed he was paying \$1,000.00 per month on his second mortgage, but the

⁴ See footnote 2, *supra*.

⁵ Wife's brief combines the last two sentences of this paragraph and states: "He bemoaned the fact that she had failed to request subsidized housing when the parties first separated so that she might have been already in an income-based apartment at the time of trial."

⁶ The bracketed material is only in Husband's brief, and Wife's brief states Husband made "something over" \$21.00 per hour, while Husband states he made "approximately" \$21.00 per hour.

actual debt was only \$352.00. The credit cards he paid with this mortgage were only in his name. [He had taken trips and cruises since the parties' separation. He had also allowed a male friend to live with him.]⁷ He had provided a home for his son, who had recently been released from prison, at no charge.

(Citations to the record omitted).

Following the trial, the court filed its memorandum opinion. By "agreement [of] the parties," the court declared them divorced pursuant to T.C.A. § 36-4-129.

With regard to the proceeds from the sale of the marital residence, Husband had received approximately \$2,100 from the total \$23,000 in equity. The trial court concluded that Husband was entitled to receive an additional \$9,000, thereby bringing the total amount received by Husband to \$11,100. Because Wife no longer had the \$9,000, the trial court ordered Wife to pay Husband \$250 per month toward the amount owed. This was to be accomplished by giving Husband a \$250 credit against Wife's monthly alimony for a period of 36 months (36 months x \$250 = \$9,000).

As to Wife's request for alimony, the trial court made an initial ruling which was later amended following Wife's filing of a motion to alter or amend. The trial court's alimony determination, as amended, provides as follows:

The Court finds the Plaintiff Wife is in need of alimony. The Defendant Husband has the ability to pay. The Plaintiff is economically disadvantaged and needs assistance to adjust to the economic consequence under the circumstances of this case. The Plaintiff, due to her medical condition of terminal cancer, 36 month life expectancy prognosis, current physical condition caused from treatment, causes the Court to find that rehabilitation is unnecessary and not feasible. Based on the foregoing . . . , the Court finds the Plaintiff shall receive transitional alimony

The Court finds reasonable monthly expenses to be \$2,100.00 for Wife. Wife now receives social security (\$579.00), [and] therefore

⁷ The bracketed portion above is from Husband's brief. The corresponding portion of Wife's brief states:

He had taken trips and cruises since the parties' separation and had even paid for the trips of the friends who traveled with him. He had also been providing a home for a friend who was separated from his wife at no charge.

[she] has a need of \$1,521.00 per month.⁸ The Husband has net wages and retirement income of \$56,196.00 annually or \$4,683.00 monthly. The Husband is found to have reasonable monthly expenses of \$2,700.00.⁹ The Husband is found to be overly aggressive in his expense request for loan reduction, food and recreational spending. Considering all factors, the Court finds the short duration of this marriage is outweighed by the factors of need, ability to pay, physical condition of the Wife, and marital property disposition.

The Husband shall therefore pay to the Wife transitional alimony for 36 months from October 5, 2005, the sum of \$960.00 per month. (\$2,100.00 less Wife's \$579.00 social security, \$311 COBRA coverage to be paid by Husband, and \$250.00 [per] month in payment of Husband's credit [from the sale of the marital residence]).

(Paragraph numbering in original omitted).

Because Wife was awarded \$960 net in monthly alimony, she was no longer eligible to receive SSI benefits and, as a consequence, lost \$579 in monthly income. She filed a second motion to alter or amend the final judgment seeking an increase in the alimony due her because of the loss of SSI benefits. Husband responded by filing his own motion to alter or amend, claiming the amount of his alimony obligation should be lowered because his net monthly income had decreased by \$1,000.

A hearing was held on the parties' competing motions. Each of the parties testified. Regrettably, this Court has not been provided a transcript or statement of the evidence from that hearing. In any event, the trial court, following this last hearing, entered an order increasing Husband's monthly alimony obligation by \$300. The trial court stated:

[T]he Court finds that the Wife's Supplemental Security Income (SSI) of \$579.00 per month has been terminated by the Social Security Administration since the last hearing in this matter, and further that the Wife's need is thereby increased. The Court further finds the only reasonable change in the Husband's ability to pay since that time is that he is now paying the sum of \$200.00 monthly to his previous counsel; however, he does have the ability to pay an additional amount of alimony to the Wife to compensate for the loss of her SSI benefits. . . . Husband shall pay to Wife, effective

⁸ At trial Wife claimed monthly expenses totaling \$2,445.68 and net monthly income of \$579 (excluding \$940 per month in child support), for a total net deficiency of \$1,866.68.

⁹ At trial Husband claimed \$4,495.96 in monthly net income and \$3,475.36 in monthly expenses, for a net monthly overage of \$1,020.16.

December 1, 2005, the sum of \$1,260.00 per month as transitional alimony as per the Court's previous Order, with the term remaining at 36 months. . . .

II.

Wife appeals, raising several issues. Wife claims the trial court erred in granting the parties an absolute divorce rather than a legal separation. Wife also claims the trial court erred in awarding transitional alimony rather than alimony in futuro. She also challenges the amount of the monthly alimony award. Finally, Wife claims the trial court erred when it failed to award her attorney's fees. Husband, on the other hand, asks this Court to affirm the judgment of the trial court in toto.

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

IV.

A.

The first issue we will discuss is whether the trial court erred in awarding the parties an absolute divorce, rather than a legal separation. This Court was confronted with the same issue in *Asher v. Asher*, No. E2000-00821-COA-R3-CV, 2001 WL 490745 (Tenn. Ct. App. E.S., filed May 9, 2001), *no appl. perm. appeal filed*. In *Asher*, the wife claimed on appeal that the trial court erred when it granted her "an absolute divorce when she only sought a legal separation . . ." *Id.*, at *1. The wife claimed, among other things, that,

a societal interest will be served by allowing the marriage to continue in that she will thereby be provided with health insurance as Mr. Asher's wife under the insurance coverage provided by his employer. Ms. Asher contends that because of her medical condition, . . . she will be unable to obtain her own insurance and that the public will, therefore, be left to assume the burden of her future medical expenses.

Id., at *3. We rejected her claim of error. We noted that the trial court had very broad discretion in deciding whether to grant a divorce as opposed to a legal separation. Because of striking similarities between these two cases, we will quote extensively from *Asher*:

The first issue in this matter contends whether the Chancery Court erred in granting Ms. Asher an absolute divorce when she only

requested a legal separation. We do not find that the Court erred with respect to this issue.

T.C.A. 36-4-119 states as follows:

Decree of court generally.- If, upon hearing the cause, the court is satisfied that the complainant is entitled to relief, it may be granted either by pronouncing the marriage void from the beginning, or by dissolving it forever and freeing each party from the obligations thereof, or by a separation for a limited time.

This court has interpreted the language set forth in T.C.A. 36-4-119 as vesting in the trial judge broad discretion as to the type and extent of relief granted. See *Hutton v. Hutton*, 584 S.W.2d 670 (Tenn. Ct. App. 1979).

Furthermore, T.C.A. 36-4-102 which pertains to a complaint for legal separation states as follows at part (d):

Notwithstanding this section, a party who can establish grounds for divorce from the bonds of matrimony pursuant to section 36-4-101 shall be entitled to an absolute divorce pursuant to the provisions of this chapter.

* * *

Our review of the record reveals that there is sufficient evidence, based on the testimony of both Mr. and Ms. Asher, for the Court to have determined that each of the above grounds for an absolute divorce existed under the circumstances of this case.¹⁰ In addition, both Mr. and Ms. Asher testified that there is no hope of reconciliation between them.

While we acknowledge that Ms. Asher prayed for legal separation only in her complaint, the Chancery Court was not restricted by her request. As stated by the Supreme Court of this State in *Lingner v. Lingner*, 56 S.W.2d 749 (Tenn. 1933) at page 752:

¹⁰ As discussed previously, in the present case the parties stipulated that each of them had grounds for divorce.

The wishes of neither party in a divorce case control the actions of the court. The court, of course, gravely considers the desires of the party wronged, but the court reserves the right to determine for itself what is best for that party.

In the *Lingner* case the Supreme Court held that a court hearing a divorce action can appropriately order an absolute divorce over the objection of the wronged spouse if reconciliation between the parties is deemed an impossibility and if no societal interest can be served by perpetuation of the union.

Asher, 2001 WL 490745, at *2-3 (footnote added).

The present case differs from *Asher* in one respect. Specifically, the wife in *Asher* offered no proof that her medical problems would persist beyond 36 months. Even though the wife in the present case may well need medical care longer than 36 months, we do not believe this fact, standing alone, is sufficient for us to conclude that the trial court abused its discretion when it awarded an absolute divorce. This conclusion is reinforced by these facts: (1) both Husband and Wife had grounds for divorce; (2) even though Wife only sought a legal separation, Husband sought an absolute divorce; and (3) Husband and Wife agree that there is no potential for a reconciliation. We find no abuse of discretion. Accordingly, the judgment of the trial court awarding an absolute divorce is affirmed.

B.

The next issue is whether the trial court erred in the type and amount of alimony. The pertinent statutory provision addressing the different types of alimony is T.C.A. § 36-5-121 (2005) which states, in pertinent part, as follows:

(d)(1) The court may award rehabilitative alimony, alimony in futuro, also known as periodic alimony, transitional alimony, or alimony in solido, also known as lump sum alimony or a combination of these, as provided in this subsection (d).

(2) It is the intent of the general assembly that a spouse, who is economically disadvantaged relative to the other spouse, be rehabilitated, whenever possible, by the granting of an order for payment of rehabilitative alimony. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected

to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(3) Where there is relative economic disadvantage and rehabilitation is not feasible, in consideration of all relevant factors, including those set out in subsection (i), the court may grant an order for payment of support and maintenance on a long-term basis or until death or remarriage of the recipient, except as otherwise provided in subdivision (f)(2)(B).

(4) An award of alimony in futuro may be made, either in addition to an award of rehabilitative alimony, where a spouse may be only partially rehabilitated, or instead of an award of rehabilitative alimony, where rehabilitation is not feasible. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

* * *

(f)(1) Alimony in futuro, also known as periodic alimony, is a payment of support and maintenance on a long term basis or until death or remarriage of the recipient. Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(2)(A) An award of alimony in futuro shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances. . . .

(3) An award for alimony in futuro shall terminate automatically and unconditionally upon the death or remarriage of the recipient. . . .

(g)(1) Transitional alimony means a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection. . . .

T.C.A. § 36-5-121(d)(1)-(4), (f)(1), (2)(A), (3), (g)(1).

We agree with the trial court's conclusion that Wife cannot be rehabilitated due to her medical condition. We disagree, however, with the trial court's determination that rehabilitation was "not necessary" and that transitional alimony is appropriate. Simply because rehabilitation is not possible does not mean that it is "not necessary" within the meaning of the statute. Stated differently, rehabilitation would "not [be] necessary" when a recipient spouse has the ability to earn a sufficient income and transitional alimony is needed only so that spouse can adjust to the economic consequences of the divorce. Transitional alimony is intended to assist the recipient spouse to get from point A to point B. Those are not the facts in the present case. Here, rehabilitation would be vital to Wife's ability to survive *if such rehabilitation was possible*, which it clearly is not. Wife herein is at point A, but due to her medical condition, she will remain at point A the rest of her life. Rehabilitation is "necessary" but, unfortunately, impossible. Transitional alimony, as that concept is defined by the statute, is not implicated by the facts of this case.

T.C.A. § 36-5-121(i) (2005) provides several factors a court must consider when determining the nature and amount of alimony. These factors are as follows:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

T.C.A. § 36-5-121(i).

We recognize that trial courts have broad discretion in determining whether to award spousal support. *See Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). Our role in reviewing a trial court’s decision regarding alimony is “to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable.” *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006) (citing *Bratton*, 136 S.W.3d at 733). We review the trial court’s decision under the abuse of discretion standard. *Broadbent*, 211 S.W.3d at 220. In the instant case, we hold that the trial court failed to properly apply the alimony principles set forth in T.C.A. § 36-5-121. Simply stated, this is not a case for transitional alimony.

When we consider the evidence in this case, particularly Wife’s diagnosis of brain cancer and her poor prognosis together with her economic circumstances, we reach the inescapable conclusion that Wife is in need of alimony “on a long term basis.”¹¹ Hence, we conclude that the trial court erred when it awarded Wife transitional alimony as opposed to alimony in futuro. The trial court’s judgment awarding Wife transitional alimony is, therefore, modified to provide for an

¹¹We recognize that Wife’s medical condition, unfortunately, may result in the “long term” being relatively short in duration.

award of alimony in futuro, to “terminate automatically and unconditionally upon the death or remarriage of the recipient.” T.C.A. § 36-5-121(f)(3).

The trial court found, in its words, “reasonable monthly expenses to be \$2,100 for Wife.” This includes an expense item of \$311 per month for COBRA insurance found in Wife’s list of expenses. The trial court decided, in effect, that Wife should receive alimony in a gross amount of \$1,821. The court, following the last hearing at which alimony was an issue, provided for the payment of this amount on a per month basis in the following manner:

Alimony paid directly to Wife	\$1,260
Husband to pay Wife’s COBRA insurance for 36 months at the monthly rate of	311
Credit against alimony payment in order to fund Wife’s debt of \$9,000 to Husband at the monthly rate of	<u>250</u>
Total Alimony	<u>\$1,821</u>

As mentioned previously, no transcript or statement of the evidence was filed which sets forth the evidence from the hearing after which the trial court modified Husband’s alimony payment a final time by increasing it by \$300 per month. This hearing was important because the trial court heard testimony from the parties regarding Wife’s increased need for alimony and Husband’s claimed reduced ability to pay. In the absence of a transcript or statement of the evidence, we must presume the trial court’s factual findings are correct. *See Taylor v. Allstate*, 158 S.W.3d 929, 931 (Tenn. Ct. App. 2004); *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). We cannot evaluate the sufficiency of evidence that is not before us. Accordingly, we affirm the trial court’s judgment as to the \$1,821 of gross monthly alimony awarded to Wife.

Since we are modifying the trial court’s alimony award from transitional to in futuro, we need to address that portion of the \$1,821 monthly award that was not designed to be paid directly to Wife. As previously noted, the trial court set Wife’s alimony entitlement at \$1,821 per month. Therefore, when Husband’s obligation to pay for Wife’s COBRA insurance coverage has been satisfied in full, the alimony paid directly to Wife will increase from \$1,260 per month to \$1,571 per month. Furthermore, when Husband has been compensated in full for his additional share of the net proceeds from the sale of the marital residence, said additional share being \$9,000 in total, Wife’s monthly alimony check will increase by \$250. This would bring her total direct payment to \$1,821. These adjustments are in keeping with the trial court’s determination that Wife was entitled to gross alimony of \$1,821 per month.

C.

The final issue is Wife's claim that the trial court erred when it failed to award her attorney's fees. In a divorce case, an award of attorney's fees is treated as an award of alimony in solido. *Eldridge v. Eldridge*, 137 S.W.3d 1, 24-25 (Tenn. Ct. App. 2002); *Kinard v. Kinard*, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998). When determining whether to award attorney's fees, a trial court is required to consider the same factors used when considering a request for alimony. *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995). The question of whether to award attorney's fees is within the wide discretion of the trial court. An appellate court will not disturb the trial court's award unless there is clear evidence that the trial court has abused its discretion. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002).

In the present case, we note that Wife used a portion of the funds from the sale of the marital residence to pay her first attorney a retainer of \$2,500. When her first attorney withdrew from the case in April 2005, the \$2,500 covered all of that attorney's fees and costs incurred up to that date, with \$615 left over which was sent to Wife's second attorney. When reviewing these and the other pertinent facts set forth above, we are unable to conclude that the trial court erred when it ordered each of the parties to pay the party's own attorney fees. Again, we note the lack of a transcript or statement of the evidence from the last hearing on the competing motions to alter or amend the alimony award. Our ability to review the propriety of the trial court's overall alimony award, which includes its judgment regarding attorney's fees, is hampered by the lack of a record setting forth the evidence from that final hearing. Hence, we cannot conclude that the trial court abused its discretion with respect to attorney's fees. The trial court's judgment regarding fees is affirmed.

V.

The judgment of the trial court is modified so as to designate Wife's monthly alimony of \$1,821 as alimony in futuro to terminate automatically and unconditionally upon the death or remarriage of Wife. As so modified, the remaining judgment of the trial court is affirmed and this cause is remanded to the trial court for enforcement of the judgment as modified and for collection of the costs assessed below, all as authorized by law. Costs on appeal are assessed one-half to the appellant, Denise Elizabeth Bailey Price, and one-half to the appellee, Gregory Ross Price.

CHARLES D. SUSANO, JR., JUDGE